IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-851

ALFRED FAYER,

Petitioner,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE, TENTH JUDICIAL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT

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PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT

Alfred Fayer prays that a writ of certiorari issue to review the judgment of the Appellate Division of the New York Supreme Court entered in this case on May 19, 1978.

Opinions Below

The decision of the Appellate Division of the New York Supreme Court, Second Department, is reported at —— A.D.2d ——, 406 N.Y.S.2d 493 (1978), and is reprinted in Appendix A. The orders entered by the Appellate Division are reprinted in Appendix B. The decisions and order of the New York Court of Appeals dismissing petitioner's ap-

peal and denying his motion for leave to appeal to that court are reprinted in Appendix C.

Jurisdiction

The judgment of the Appellate Division of the New York Supreme Court, Second Department was entered on May 19, 1978. The orders of the Court of Appeals denying leave to appeal and dismissing the appeal to that court were entered on September 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

Whether the failure of the State of New York to provide for any type of hearing prior to the summary automatic life-long disbarment of an attorney convicted of a federal felony violates petitioner's right to due process guaranteed by the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

Fourteenth Amendment, United States Constitution:

"• • • No State shall • • • deprive any person of life, liberty, or property, without due process of law • • •."

Section 90(4) of the New York Judiciary Law:

"4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

"Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted

shall, by order of the court, be struck from the roll of attorneys."

Statement

Petitioner was duly admitted to the Bar of the State of New York in 1942. On August 19, 1977, a judgment of conviction after trial was entered against him in the United States District Court for the Eastern District of New York on four counts of making false declarations, in violation of 18 U.S.C. § 1623. The alleged false declarations arose from his testimony at a prior non-jury trial in the same court, at the conclusion of which petitioner was acquitted. Imposition of sentence on the false declarations conviction was suspended on Counts 1, 2 and 3 and petitioner was placed on probation for one month; on Count 4 he was sentenced to pay a $5,000 fine.

The Appellate Division of the New York Supreme Court automatically disbarred petitioner for life as of the date of his conviction, pursuant to Section 90(4) of the New York Judiciary Law. No prior notice was given or hearing held at which petitioner was afforded an opportunity to be heard in mitigation, nor is one provided by statute. Subsequently, on March 15, 1978, respondent moved in the Appellate Division to strike petitioner's name from the roll of attorneys. Although petitioner requested a hearing and submitted papers in opposition challenging the constitutionality of Section 90(4) of the Judiciary Law and presenting mitigating circumstances, no hearing was held and an order was summarily entered on May 19, 1978, striking petitioner's name from the roll.*

Petitioner then sought review of his disbarment in the New York Court of Appeals, both as an appeal as of right

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* Because of an error in the description of petitioner's conviction in the May 19th order, said order was amended *nunc pro tunc* by the Appellate Division on June 9, 1978.

and by motion for leave to appeal. The sole issue raised on appeal was the constitutionality under the Fourteenth Amendment to the United States Constitution (and the equivalent provisions of the state constitution) of the automatic disbarment provision for attorneys convicted of a felony, contained in Section 90(4) of the New York Judiciary Law—the identical issue raised in the instant petition. Specifically, petitioner argued that (1) the failure to afford an attorney a hearing prior to disbarment for life with no right to reinstatement violated the Due Process Clause, and (2) the disciplinary provisions governing attorneys as compared with all other New York licensed professionals constituted separate and unequal treatment in violation of the Equal Protection Clause. By decision and order dated September 1, 1978, the Court of Appeals denied leave to appeal and dismissed the appeal, on the ground that "no substantial constitutional question is directly involved." This case is thus properly before the Court on certiorari to the Appellate Division of the New York Supreme Court. *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 678 n.1 (1968), *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 160, *reh. den.,* 347 U.S. 931 (1954), *Hammerstein* v. *Superior Court,* 341 U.S. 491, 492 (1951), *American Ry. Exp. Co.* v. *Levee,* 263 U.S. 19, 20-21 (1923), *Sullivan* v. *Texas,* 207 U.S. 416 (1908).

Reason for Granting the Writ

The failure of the State of New York to provide for any type of hearing prior to the summary automatic life-long disbarment of an attorney convicted of a federal felony violated petitioner's right to due process guaranteed by the Fourteenth Amendment.

The extreme sanction of disbarment has been consistently recognized by this Court as a punishment or penalty imposed on the lawyer. *In re Ruffalo,* 390 U.S. 544, 550, *reh. den.,* 391 U.S. 961 (1968), *Spevack* v. *Klein,* 385 U.S. 511, 515 (1967), *Ex parte Garland,* 4 Wall. 333, 380 (1866). Given the "quasi-criminal" nature of the proceedings, an attorney subject to disbarment is entitled to procedural due process, since the sanction of disbarment will destroy his reputation and livelihood. *In re Ruffalo, supra.* Although the power to control the practice of law and to discipline its practitioners rests primarily with the States, that power "cannot be exercised so as to abrogate federally protected rights". *Johnson* v. *Avery,* 393 U.S. 483, 490 n.11 (1969). Before a state can exclude a person from practicing law, "the requirements of due process must be met". *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 102 (1963).

Fundamental to the concept of due process is the right to be heard prior to decision, particularly when a person's good name and professional license are at stake. *Wolff* v. *McDonnell,* 418 U.S. 539, 558 (1974); *Roe* v. *Wade,* 410 U.S. 113, 219 (1973) (Douglas, J. concurring); *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972). In numerous instances significantly less serious than disbarment for life, this Court has afforded citizens the basic due process rights here denied petitioner. See, *e.g., Goss* v. *Lopez,* 419 U.S. 565 (1975) (suspension of students from school); *Perry* v. *Sindermann,* 408 U.S. 593 (1972) (teachers with implied tenure may not be terminated without due process); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) (revocation of parole); *Bell* v. *Burson,* 402 U.S. 535 (1971) (suspension of driver's license); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) (termination of relief payments). As this Court stated in *Theard* v. *United States,* 354 U.S. 278, 282 (1957):

> "Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred."

The statute under which petitioner was disbarred—Section 90(4) of the Judciary law—mandates automatic sum-

mary disbarment in all cases where an attorney has been convicted of a felony, irrespective of the seriousness of the felony. *Matter of Chu,* 42 N.Y.2d 490, 398 N.Y.S.2d 1001, 369 N.E.2d (1977). For example, the New York Court of Appeals recently upheld the automatic disbarment of an attorney convicted of assaulting a federal officer, arising out of what the sentencing judge described as a "kindergarten shouting and pushing match" between the attorney and federal agents in the hallway of a federal court. *Matter of Thies,* —— N.Y.2d —— (October 19, 1978) (No. 389). Attorneys subject to the summary provisions of Section 90(4) have been held to be disbarred for life and not entitled to reinstatement. *Matter of Glucksman,* 57 A.D.2d 205, 394 N.Y.S.2d 191 (1st Dept. 1977). Moreover, there is no automatic right to appeal the automatic summary disbarment, and the only possible review is by leave of the Court of Appeals or the Appellate Division, unless constitutional issues are directly involved in the determination below. By contrast, attorneys convicted of misdemeanors, irrespective of their gravity, are entitled to at least one hearing in mitigation and explanation prior to the imposition of discipline. Rule 603, First Department; Rule 619, Second Department; Rule 806, Third Department; and Rule 1022, Fourth Department.

The statute's automatic provisions fail to provide the court with the needed facts to draw meaningful distinctions which are the life-blood of any judicial system. Crimes are not fungible, even those classified broadly as felonies; nor does it follow that attorneys convicted of felonies should be denied a hearing before imposition of discipline. The bare record of conviction on which the disbarment is exclusively premised cannot reveal whether, for example, the crime involved moral turpitude, or if so, the degree of such involvement. The lack of any hearing also leaves the court ignorant of any substantial mitigating circumstances which may be present. As this Court noted in a related context,

> "In determining whether a person's character is good, the nature of the offense which he has committed must be taken into account." *Schware* v. *Board of Bar Examiners of New Mexico,* 353 U.S. 232, 243 (1957).

Petitioner here was even denied oral argument. *Herring* v. *New York,* 422 U.S. 853 (1975) (New York practice of permitting the court in a non-jury criminal trial to deny counsel the opportunity to give a summation held to be an unconstitutional deprivation of right to counsel).

A statute which provides for disbarment under such circumstances, without notice or a hearing, is void as contrary to the constitutional guarantee of procedural due process. *In re Ruffalo, supra, Charlton* v. *F.T.C.,* 543 F.2d 903 (D.C. Cir. 1976), *Matter of Jones,* 506 F.2d 527 (8th Cir. 1974); *Burkett* v. *Chandler,* 505 F.2d 217 (10th Cir. 1974), *cert. den.,* 423 U.S. 876 (1975); *Nell* v. *United States,* 450 F.2d 1090 (4th Cir. 1971); *In re Echeles,* 430 F.2d 347 (7th Cir. 1970); *In re Crow,* 283 F.2d 685 (6th Cir. 1960); *Tedesco* v. *O'Sullivan,* 420 F.Supp. 194 (D.Conn. 1976).

The absence of the customary rudiments of due process in the New York procedure is one of the reasons why no other State's disciplinary statutes provide for summary automatic disbarment. California, for example, amended its statute in 1955 to eliminate summary disbarment and to substitute a statute requiring disbarment or suspension "according to the gravity of the crime and the circumstances of the case." California Business & Professions Code, Section 6102. See, *In re Smith,* 432 P.2d 231, 232-33 (1967). The model American Bar Association disciplinary rules as well do not provide for automatic summary disbarment (Appendix D). Indeed, Rule 8 of this Court, which governs the procedure for disbarring a member thereof, provides the attorney an opportunity to be heard in mitigation prior to disbarment. Significantly, if a State fails to afford due process in its disciplinary proceedings, those proceedings will not be recognized as an adequate predicate to disbarment in this Court. *Selling* v. *Radford,* 243 U.S. 46 (1917); *In re Ruffalo, supra.*

Clearly, New York's uniquely automatic, summary and permanent method of disciplining convicted attorneys is violative of the Due Process Clause, as well as contrary to the applicable decisions of this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

November 21, 1978

Respectfully submitted,

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APPENDIX A

Decision of the New York Supreme Court, Appellate Division, Second Department, —— A.D.2d ——, 406 N.Y.S.2d 493.

In the Matter of ALFRED FAYER, an attorney and counselor-at-law.

THE JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE, TENTH JUDICIAL DISTRICT,

Petitioner,

v.

ALFRED FAYER,

Respondent.

Supreme Court, Appellate Division, Second Department.

May 19, 1978.

Before MOLLEN, P. J., and HOPKINS, MARTUSCELLO, LATHAM and SHAPIRO, JJ.

MEMORANDUM BY THE COURT.

Motion by petitioner to strike the respondent's name from the roll of attorneys and counselors-at-law on the ground that the respondent has been disbarred by virtue of a felony conviction.

Motion granted.

The respondent, Alfred Fayer, admitted to practice before the Bar by this court on August 19, 1942, under the name Feuereisen, was convicted of a felony (violation of U.S. Code tit. 18, § 1623) in that while under oath as a witness in a trial before the U.S. District Court for the

Appendix A.

Eastern District of New York, he did knowingly make false material declarations in the United States District Court, for the Eastern District of New York on August 19, 1977, which judgment was amended nunc pro tunc on May 5, 1978.

The clerk of this court is directed to strike his name from the roll of attorneys and counselors-at-law forthwith by reason of said conviction (*Matter of Chu,* 42 N.Y.2d 490, 398 N.Y.S.2d 1001, 369 N.E.2d 1).

APPENDIX B

Orders of the New York Supreme Court, Appellate Division, Second Department (unreported).

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 19, 1978.

HON. MILTON MOLLEN, Presiding Justice,
HON. JAMES D. HOPKINS,
HON. M. HENRY MARTUSCELLO,
HON. HENRY J. LATHAM,
HON. J. IRWIN SHAPIRO,
Associate Justices.

In the Matter of Alfred Fayer, an attorney, admitted under the name of Alfred Feuereisen.

The Joint Bar Association Grievance Committee for the Tenth Judicial District,
Petitioner;

Alfred Fayer,
Respondent.

ORDER

In the above entitled disciplinary proceeding, the above named The Joint Bar Association Grievance Committee for the Tenth Judicial District, petitioner, having moved, by a notice of motion, dated March 15, 1978, to strike the name of the respondent Alfred Fayer, an attorney and counselor-at-law, who was admitted to practice by this court on August 19, 1942 under the name Alfred Feuereisen, from the Roll of Attorneys and Counselors-at-Law,

on the ound that the said respondent had been disbarred by virtue of a felony conviction (violation of US Code tit. 18, § 1623) in that while under oath as a witness in a trial before the U. S. District Court for the Eastern District of New York, he did knowingly make false material declarations and did endeavor to influence the witness not to testify voluntarily before the Grand Jury, in the United States District Court, for the Eastern District of New York on August 19, 1977;

Now, upon the said notice of motion and the affidavit of Francis F. Doran and the judgment of conviction annexed thereto in support of the said motion and respondent's memorandum in response thereto; and Francis F. Doran, Esq., having appeared of counsel for the petitioner and Messrs. Martin, Obermaier & Morvillo, Esqs., having appeared of counsel for the respondent, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the said motion is hereby granted, and it is further

ORDERED that, effective May 19, 1978, the name of the respondent Alfred Fayer, admitted under the name Alfred Feuereisen, is hereby struck from the Roll of Attorneys and Counselors-at-Law by reason of said conviction (*Matter of Chu,* 42 NY2d 490), and it is further

ORDERED that, pursuant to Statute (Judiciary Law, § 90), the said Alfred Fayer, admitted under the name of Alfred Feuereisen, is hereby commanded to desist and refrain: (1) from the practice of the law in any form, either as principal, or as agent, clerk or employee of another; (2) from appearing as an attorney or counselor-at-law before any judge, justice, board, commission or other public au-

thority; (3) from giving another an opinion as to the law or its application or any advice in relation thereto; and (4) from holding himself out in any way as an attorney and counselor-at-law, and it is further

ORDERED and DIRECTED that the said Alfred Fayer, admitted as Alfred Feuereisen, shall comply with this court's rules governing the conduct of disbarred, suspended or resigned attorneys—a copy of such rules being annexed hereto and made a part hereof.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

Appendix B.

At a term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 9, 1978.

HON. MILTON MOLLEN, Presiding Justice,
HON. JAMES D. HOPKINS,
HON. M. HENRY MARTUSCELLO,
HON. HENRY J. LATHAM,
HON. J. IRWIN SHAPIRO,
Associate Justices.

[SAME TITLE]

ORDER AMENDING DECISION AND ORDER.

In the above entitled disciplinary proceeding, this court by a decision and an order, both dated May 18, 1978, *inter alia,* having struck the name of the respondent Alfred Fayer, admitted under the name Alfred Feuereisen, from the Roll of Attorneys and Counselors-at-Law, by reason of a judgment of conviction of the United States District Court for the Eastern District of New York, dated August 19, 1977; thereafter, the attorneys for the said respondent, under date of June 1, 1978, having forwarded a further judgment of the said District Court, dated May 5, 1978, amending the said judgment of August 19, 1977 *nunc pro tunc;*

Now, in accordance therewith and upon the decision slip of the court herein, heretofore filed and made a part hereof, on this court's own motion, it is

Appendix B.

ORDERED that the said decision, dated May 19, 1978 is hereby amended by striking from the third paragraph thereof everything in said paragraph following the words "knowingly make false material declarations" and by substituting therefor the following: "in the United States District Court for the Eastern District of New York on August 19, 1977, which judgment was amended *nunc pro tunc* on May 5, 1978", and it is further

ORDERED the recital portion of the said order dated May 19, 1978, entered on said decision, is hereby amended accordingly.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Diviison.

APPENDIX C

Decision and Order of the Court of Appeals of the State of New York (September 1, 1978) (unreported).

Mo. No. 755

[SAME TITLE]

Motion for leave to appeal denied.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of September A.D. 1978.

PRESENT, HON. CHARLES D. BREITEL, Chief Judge, presiding.

Mo. No. 838

[SAME TITLE]

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken as of right in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

JOSEPH W. BELLACOSA
Clerk of the Court

APPENDIX D

"Suggested Guidelines for Rules of Disciplinary Enforcement", Standing Committee on Professional Discipline of the American Bar Association, Rule XIV.

RULE XIV

Attorneys Convicted of Crimes

(a) Upon the filing with the Supreme Court of a certificate of conviction demonstrating that an attorney has been convicted of a serious crime as hereinafter defined, the Court shall enter an order immediately suspending the attorney, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction. Upon good cause shown, the Court may set aside such order restraining the attorney from engaging in the practice of law when it appears in the interest of justice so to do.

(b) The term "serious crime" shall include any felony and any lesser crime a necessary element of which as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

(c) A certificate of a conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against him based upon the conviction.

(d) Upon the receipt of a certificate of conviction of an attorney for a serious crime, the Court shall in addition to suspending him in accordance with the provisions of paragraph (a) of this Rule, also refer the matter to the Board for the institution of a formal proceeding before a hearing committee in which the sole issue to be determined shall be the extent of the final discipline to be imposed, provided that a disciplinary proceeding so instituted will not be brought to hearing until all appeals from the conviction are concluded.

(e) Upon receipt of a certificate of a conviction of an attorney for a crime not constituting a serious crime, the Court shall refer the matter to the Board for whatever action it may deem warranted, including the institution of an investigation by Disciplinary Counsel, or a formal proceeding before a hearing committee, provided, however, that the Court may in its discretion make no reference with respect to convictions for minor offenses.

(f) An attorney suspended under the provisions of paragraph (a) of this Rule will be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed but the reinstatement will not terminate any formal proceeding then pending against the attorney, the disposition of which shall be determined by the hearing committee and the Board on the basis of the available evidence.

(g) The clerk of any court in this state in which an attorney is convicted of a crime shall within ten days of said conviction transmit a certificate thereof to this Court.

(h) Upon being advised that an attorney subject to the disciplinary jurisdiction of this Court has been convicted of a crime, Disciplinary Counsel shall determine whether the clerk of the court where the conviction occurred has forwarded a certificate to this Court in accordance with

the provision of paragraph (g) of this Rule. If the certificate has not been forwarded by the Clerk or if the conviction occurred in another jurisdiction, it shall be the responsibility of the Disciplinary Counsel to obtain a certificate of the conviction and to transmit it to this Court.

(i) An order suspending an attorney from the practice of law pursuant to this rule shall not constitute a suspension of the attorney for the purpose of Rule XVIII unless this Court shall so order.

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ALFRED FAYER,

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JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE,
TENTH JUDICIAL DISTRICT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT

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IN THE

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No. 78-851

AFLRED FAYER,

Petitioner,

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JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE,
TENTH JUDICIAL DISTRICT,

Respondent.

PRELIMINARY STATEMENT

This brief is submitted in opposition to the petition for a writ of certiorari to review the judgment of the Appellate Division of the New York State Supreme Court.

The petitioner was automatically disbarred by order of the Appellate Division of the New York State Supreme Court, Second Department, pursuant to Section 90(4) of the Judiciary Law and the inter-

pretation thereof in Matter of Chu, 42 N.Y.2d 490 (1977).

REASON FOR DENYING THE WRIT

THE STATE OF NEW YORK HAS NOT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT BY AUTOMATICALLY DISBARRING HIM WITHOUT A PRIOR HEARING

The words "punishment" and "penalty" are used to describe sentencing after a criminal conviction. A disciplinary proceeding, although characterized as "quasi-criminal" in nature, cannot be equated to a criminal proceeding (Matter of Kelly, 23 N.Y.2d 368), which interprets In re. Ruffalo, 390 U.S. 544.

The State, which has the authority to extend the privilege to a person to practice law within its jurisdiction, also has the authority to diminish or remove that privilege.

In a fairly recent case (April 5, 1977), the New York Court of Appeals reaffirmed the words of Judge Cardozo:

> "We hold that disciplinary sanctions are not punishment within the meaning of Section 50.10. As Judge Cardozo explained in Matter of Rouss (221 N.Y. 81, pp 84-85): 'Membership in the bar is a privilege burdened with conditions. A fair, private and professional character is one of them.. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards [citations omitted]. Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime.' Whether the practice of law is termed a privilege (Matter of Rouss, supra) or a right (Matter of Levy, 37 N.Y.2d 279, 282), disciplinary sanctions imposed for misconduct are not criminal penalties under the statute." (Matter of Anonymous, 41 N.Y.2d 506, 508.)

The concern of New York State in permitting a convicted attorney to continue practicing law is best expressed in Matter of Mitchell (40 N.Y.2d 153), which quotes Judges Cardozo and Bradley:

> "In our view, this concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession. Appellant, upon admission to the Bar, becomes an officer of the court, and, 'like the court itself, an instrument or agency to advance the ends of justice.' (People ex rel. Karlin v. Culkin, 248 N.Y. 465, 471 [CARDOZO, J.]). To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law. Justice BRADLEY, writing nearly one hundred years ago, expressed this same fear in language equally applicable to this case and particularly to this attorney: 'Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world,

> to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.' (Matter of Wall, 107 U.S. 265, 274.)" (supra at 156).

Likewise, the Federal Courts have reaffirmed this position in Matter of Echeles (430 F.2d 347):

> "Preliminarily, it would be well to note that disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public

> from the official ministration of persons unfit to practice." (Id. at 349; see: Matter of Ming, 469 F.2d 1352).

For these reasons, the New York Court of Appeals, on October 13, 1977, modified its holding in Matter of Donegan, 283 N.Y. 285 by its ruling in Matter of Chu, 42 N.Y.2d 490, when it held:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when Donegan was decided, we now perceive little or no reason for distinguishing between conviction of a federal felony and conviction of a New York State felony as a predicate for professional discipline." (supra at 493).

With regard to the petitioner's argument that he has not been afforded due process because he has not been granted a

plenary hearing, the New York Court of Appeals has stated that the "constitutional guarantee of due process is safeguarded by his [the petitioner's] jury trial and appellate review" (Matter of Abrams, 38 A.D.2d 334, at 336).

As to the "seriousness of the felony", New York State seems to be saying that if the crime is serious enough for the United States Congress "to merit punishment as a felony", then it "is sufficient ground to invoke automatic disbarment." (Matter of Chu, supra). Although Matter of Thies, ___ N.Y.2d ___ (October 1978) (No. 389) may have been described as a "kindergarden shouting and pushing match", it was, in fact, a case in which an attorney was convicted of a felony for assaulting a federal officer.

If the New York Courts have the authority to discipline its attorneys and a felony conviction is considered sufficient grounds to disbar, then there is no need for a plenary hearing to draw "meaningful distinctions."

The petitioner, who was convicted on four counts of making false declarations, should not be heard to complain, as these acts are certainly within the meaning of professional misconduct, albeit classified as "illegal conduct involving moral turpitude" or "conduct involving dishonesty, fraud, deceit or misrepresentation." (The Lawyer's Code of Professional Responsibility, American Bar Association, adopted by the New York State Bar Association on January 1, 1970, DR 1-102(A)(3) and (4)). He has also been afforded the opportunity to present oral argument on the merits,

in defense of the charges and all mitigating circumstances during his criminal trial in the Federal Court. His constitutional guarantee of due process was safeguarded in that proceeding (Matter of Abrams, supra).

In a recent case where the petitioner argued that the Ohio permanent disbarment rule was punitive and that a presumption of unfitness without an opportunity to prove otherwise denied procedural and substantive due process, this Court denied certiorari (Shott v. Startzman, ___ U.S. ___, No. 77-327).

Also, this Court has denied certiorari in several recent New York cases where violations of due process were argued (Peltz v. JBAGC, 98 S Ct. (1978), No. 77-1437; Davis v. JBAGC, 99 S Ct. (1978), No. 77-1790; Rosenberg v. JBAGC (October 30, 1978).

Regarding the "suggested guidelines" of the American Bar Association, it should be stated that these rules have not been adopted by the New York State Bar Association.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Mineola, New York
December 8, 1978

Respectfully submitted,

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